No. 06-

IN THE

Supreme Court of the United States

J.H. FLETCHER & CO.,

Petitioner,

v.

JERRILL DAVIS AND VIRGINIA DAVIS, *ET AL.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE WEST VIRGINIA SUPREME COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

MICHAEL J. FARRELL
TAMELA J. WHITE
FARRELL, FARRELL & FARRELL, PLLC
914 Fifth Avenue
P.O. Box 6457
Huntington, WV 25772
(304) 522-9100

STUART M. GERSON*
STEVEN M. UMIN
JULIANNA S. GONEN
EPSTEIN BECKER & GREEN, P.C.
1227 25th Street, N.W.
Suite 700
Washington, D.C. 20037
(202) 861-0900

* *Counsel of Record*

Attorneys for Petitioner

207063

COUNSEL PRESS

QUESTIONS PRESENTED

Whether a federal regulatory scheme such as the Mine Safety and Health Act ("MSHA"), 30 U.S.C. §§ 801, *et seq.*, that on its face preempts only conflicting state laws, may so occupy a limited field within that scheme that it reflects an intent to preempt any state law purporting to regulate in that discrete area.

Whether a federal regulatory scheme such as the MSHA, that permits states to impose health and safety standards more stringent than the federal requirements, contemplates the creation of the more stringent standards through tort litigation rather than by positive legislative enactments.

PARTIES TO THE PROCEEDINGS

The petitioner here, appellant below, is J.H. Fletcher & Co. [hereinafter "Fletcher"], a manufacturer of roof bolting machines that drill into rock to create the architectural support that prevents mine collapse.

The respondents, appellees below, are West Virginia coal miners and their spouses.

CORPORATE DISCLOSURE STATEMENT

J.H. Fletcher & Co. has no parent company, and no publicly held company owns ten percent (10%) or more of its stock.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
CORPORATE DISCLOSURE STATEMENT	ii
TABLE OF CONTENTS	iii
TABLE OF CITED AUTHORITIES	v
TABLE OF APPENDICES	viii
OPINION BELOW	1
JURISDICTIONAL STATEMENT	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
A. The Parties	2
B. Federal Standards Related to Roof Bolting Machines	2
C. Proceedings Below	5

Contents

	Page
REASONS FOR GRANTING THE PETITION ...	6
I. The West Virginia Supreme Court Erred in Finding No Field Preemption in the Area of Roof Bolting Machines	7
A. This Court Has Not Addressed the Question of Whether a Federal Regulatory Regime Allowing for Concurrent State Law May Also Establish Field Preemption and Proscribe State Law Within a Discrete Area of That Regime	7
B. The Federal Government Has Occupied the Field of Regulating Roof Bolting Machines	9
II. States May Not Supplement Federal Regulations Pertaining to Roof Bolting Machines Via Tort Liability Under Principles of Conflict Preemption	11
CONCLUSION	15

TABLE OF CITED AUTHORITIES

FEDERAL CASES *Page*

Bates v. Dow Agrosciences LLC, 544 U.S. 431 (2005) 11

CSX Transportation, Inc. v. Easterwood, 507 U.S. 658 (1993) 11, 13

Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992) 11, 13

English v. General Electric Co., 496 U.S. 72 (1990) 7, 10

Fidelity Federal Savings & Loan Association v. De la Cuesta, 458 U.S. 141 (1982) 7

Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963) 15

Freightliner Corp. v. Myrick, 514 U.S. 280 (1995) 9

Gade v. National Solid Wastes Management Association, 505 U.S. 88 (1992) 8-9

Geier v. American Honda Motor Co., 529 U.S. 861 (2000) 12, 13, 14

Louisiana Public Service Commission v. FCC, 476 U.S. 355 (1986) 8

Cited Authorities

Page

Pacific Gas & Electric Co. v. State Energy Resources Conservation and Development Commission, 461 U.S. 190 (1983) 7

Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947) 7, 10

Silkwood v. Kerr-McGee Corp., 464 U.S. 238 (1984) 14

Sprietsma v. Mercury Marine, 537 U.S. 51 (2002) ... 14

STATE CASES

Davis v. Eagle Coal and Dock Co., __ S.E.2d __, 2006 WL 3543017 1

FEDERAL STATUTES AND REGULATIONS

30 C.F.R. Part 33 .....1, 3, 9, 10, 12

30 C.F.R. § 33.1 4

30 C.F.R. § 33.12 ..... 4, 14

30 C.F.R. § 33.6 4

30 C.F.R. §§ 70.100-70.101 6

30 C.F.R. §§ 90.100-90.101 6

Cited Authorities

	Page
Mine Safety and Health Act ("MSHA"), 30 U.S.C. §§ 801, *et seq*	i, 4
28 U.S.C. § 1257	1
30 U.S.C. §§ 801, 811, 844	9
30 U.S.C. §§ 801-811, 844, 955	1
30 U.S.C. § 811 (7)	5
30 U.S.C. § 844	4, 10
30 U.S.C. § 955	6, 15
30 U.S.C. § 955(a)	11
30 U.S.C. § 955(b)	9, 12
LEGISLATIVE HISTORY	
Amendments to the Federal Coal Mine Safety Act: Hearings Before the Subcommittee On Labor of the Senate Committee On Labor & Public Welfare, 89th Cong. (1965)	3, 4
H.R. Chap. 240, 61st Cong. (1910)	2
H.R. 2682, 77th Cong., 55 Stat. 177 (1941)	3
S. 1310, 77th Cong. § 209(f), 66 Stat. 692 (1952)	3

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The Supreme Court Of Appeals Of West Virginia Decided December 4, 2006 ..... 1a

Appendix B — Order Of The Circuit Court Of Mingo County, West Virginia Certifying Questions To The West Virginia Supreme Court Of Appeals Entered June 17, 2005 ..... 27a

OPINION BELOW

The opinion of the West Virginia Supreme Court of Appeals is reported at __ S.E.2d __, 2006 WL 3543017 (W. Va. 2006), and is reprinted in the Appendix ("Pet. App.") at 1a. That Court reversed the Circuit Court of Mingo County whose opinion is reprinted at Pet. App. 27a.

JURISDICTIONAL STATEMENT

The West Virginia Supreme Court of Appeals, the highest state court in West Virginia, issued its opinion on December 4, 2006.

This Court has jurisdiction under 28 U.S.C. § 1257(a). The opinion below upsets the intent of Congress to preempt state law as to dry dust suppression systems incorporated within roof bolting machines and impairs the Mine Safety and Health Administration's regulations that require manufacturers to submit to the agency all engineering drawings, all use warnings and instructions, and an end product for performance testing and approval. 30 U.S.C. §§ 801-811, 844, 955 (2000); 30 C.F.R. Part 33 (2006).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause of the United States Constitution governs the issues presented. The specific federal statutes and regulations involved are provisions of the Mine Safety and Health Act 30 U.S.C. §§ 801-811, 844, 955, and certain of its implementing regulations, 30 C.F.R. Part 33.

STATEMENT OF THE CASE

A. The Parties

Petitioner Fletcher designs and manufactures underground mining equipment and has devoted most of its engineering expertise to one product, the underground roof bolting machine. A roof bolting machine is a large apparatus used to install metal rods ("roof bolts") and glue ("resin") into the roof and walls of a mine. The roof bolts and resin bond with the earth's layers, creating an architectural network that prevents the roof and walls from collapsing.

All of the Fletcher machines at issue are equipped with dry dust suppression systems. Before any version of the dry dust suppression system designed by Fletcher can be incorporated into a roof bolting machine and placed in the stream of commerce, it must be inspected, tested and approved by the federal Mine Safety and Health Administration ("MSHA") (formerly the Bureau of Mines) to ensure its engineering, workmanship, performance, and test results with respect to air quality and dust emissions.

Respondents are coal miners who have worked in underground coal mines and have received state employment benefits for dust-related occupational illness and their spouses.

B. Federal Standards Related to Roof Bolting Machines

Congress established the Bureau of Mines in 1910, and gave to it primary responsibility for promoting miner safety. H.R. 13915, 61st Cong., 36 Stat. 369 (1910). But the Bureau was expressly forbidden to inspect or supervise the mines in

any State. *Id.* A Federal inspection program was created when the Federal Coal Mine Safety Act was passed in 1941, but it too was ineffective because federal employees could not require coal mine inspections and thereby lacked serious enforcement authority. H.R. 2682, 77th Cong., 55 Stat 177 (1941).

Congress amended the Federal Coal Mine Safety Act in 1952, and finally empowered the Bureau of Mines to conduct inspections. *Amendments to the Fed. Coal Mine Safety Act: Hearings Before the Subcomm. On Labor of the Senate Comm. On Labor & Pub. Welfare*, 89th Cong. 63-64 (1965) [hereinafter *Hearings*] (Annual Report, Division of Coal Mine Inspection, Bureau of Mines, 1964). Title I of the 1952 Act addressed miner health and called upon federal inspectors to determine the causes of accidents and occupational diseases. Title II took the first step in regulating the machinery and products used in coal mines, mandating that any electrical equipment used at the mine face had to be approved before use. S. 1310, 77th Cong. § 209(f), 66 Stat. 692 (1952).

In 1960, the Federal Bureau of Mines (now the Mine Safety and Health Administration) promulgated 30 C.F.R. Part 33 to regulate roof bolting machines, implementing Congress' determination of a need for dramatic changes in roof control technology in light of the demonstrated success of roof bolting machines:

> [U]ntil 1948, no person or agency had produced any new or improved means of satisfactorily solving the problems presented by this No. 1 killer in coal mines. The Bureau realized that, to reduce coal mine injuries, it would be necessary to find better methods of roof control; its efforts in that

> direction finally culminated in a new method of roof control known as roof bolting, . . . The basic principle of this method is to prevent the initial sag in exposed roof strata by converting the strata into a rigid beam, with steel bolts set in holes drilled in the roof rock.

Hearings, *supra*, at 87 (Annual Report, Division of Coal Mine Inspection, Bureau of Mines, 1964). It is this set of regulations that lies at the heart of this case. "The regulations in this part set forth the requirements for dust collectors used in connection with rock drilling in coal mines to procure their certification as permissible for use in coal mines . . . ." 30 C.F.R. § 33.1 (2006). Part 33 includes an approval process that entails a written application describing any independent laboratory used in testing the equipment, a specification of the operating conditions for which certification is requested, drawings and specifications, details of all dust-collector parts, storage capacity, net filter area in the dust separator, and a complete unit or system for inspection and testing. 30 C.F.R. § 33.6 (2006).

If a roof bolting machine is approved by MSHA, any subsequent changes to that product must be submitted to a similar approval process. 30 C.F.R. § 33.12 (2006).

On January 10, 1969, Senator Jennings Randolph introduced what became the 1969 Federal Coal Mine Safety and Health Law, 30 U.S.C. §§ 801, *et seq.* In that legislation Congress declared that "the dust from drilling in rock shall be controlled by the use of permissible dust collectors, or by water or water with a wetting agent or by any other method or devices approved by the Secretary which is at least as effective in controlling such dust." 30 U.S.C. § 844 (2000).

The need for uniformity in this aspect of federal mine safety law was confirmed again in 1977 when Congress addressed another deficiency in federal authority: the limitation of prior law to coal mines. The 1977 amendments extended federal jurisdiction and the provisions of Chapter 30 to all mines (metal, non-metal and coal). In those amendments Congress also prescribed federal control over warning labels:

> Any mandatory health or safety standard promulgated under this subsection shall prescribe the use of labels or other appropriate forms of warning as are necessary to insure that miners are apprised of all hazards to which they are exposed, relevant symptoms and appropriate emergency treatment, and proper conditions and precautions of safe use or exposure.

30 U.S.C. § 811 (7) (2000).

Far from promoting uniformity, if the West Virginia Supreme Court of Appeals decision stands, a manufacturer of roof bolting machines in the United States may be subjected to repetitive and disparate outcomes in the courts of any of the fifty states despite the fact that all such manufacturers have relied upon the federal approval, testing and certification system set forth in regulations in 1960 and enacted by Congress in 1969. This Petition seeks relief from this perilous burden.

C. Proceedings Below

In these lawsuits, Respondents seek to recover for silicosis through common law claims asserted against current

and former coal mine operators (employers) and product liability claims against equipment manufacturers, including manufacturers of roof bolting equipment. Respondents contend that they did not know, despite federal laws explicitly dealing with quartz (silica) in mines (30 C.F.R §§ 70.100-70.101 (2006) and 30 C.F.R. §§ 90.100-90.101 (2006)), that quartz is liberated by the work they perform.

In response to Motions to Dismiss, the Circuit Court of Mingo County, West Virginia, ruled in favor of Petitioner, finding Respondents' common law claims preempted by federal law. Because the issues presented were both unsettled and very important, the Circuit Court certified the questions to the West Virginia Supreme Court of Appeals. In reversing the Circuit Court, the Supreme Court of Appeals failed to recognize the preemptive control that the United States Congress had vested in the Department of Labor and the MSHA over this discrete component of the mining industry.

REASONS FOR GRANTING THE PETITION

Enforcing proper principles of preemption is a critical undertaking in striking an appropriate balance between national and state interests in our federal system. No federal court has yet construed the preemption and savings clause provisions of the Mine Safety and Health Act (30 U.S.C. § 955 (2000)). Given the importance of both the industry and the health and safety of its workers, and the spate of recent tort litigation, the scope of the Act's preemption provisions is in urgent need of definition. The decision of the West Virginia Supreme Court of Appeals threatens to undermine the balance struck by Congress and the federal Mine Safety and Health Administration because its opinion disregards the federal government's preemption of the narrow

field in which roof bolting machines with dry dust suppression systems are regulated. In addition, the decision below misreads federal law to permit tort suits as a means of establishing supplemental state rules.

I. The West Virginia Supreme Court Erred in Finding No Field Preemption in the Area of Roof Bolting Machines

A. This Court Has Not Addressed the Question of Whether a Federal Regulatory Regime Allowing for Concurrent State Law May Also Establish Field Preemption and Proscribe State Law Within a Discrete Area of That Regime

This Court has recognized three types of preemption of state law by federal law. Express preemption is the most straightforward because the federal statute explicitly expresses an intent to preempt state policy within the federally regulated area. *English v. Gen. Elec. Co.*, 496 U.S. 72, 78 (1990). This Court has also recognized implied preemption when a federal statute does not expressly preempt state law but certain factors are present that indicate a congressional intent to effect some form of preemption. There are two forms of implied preemption. Conflict preemption precludes state laws that are incompatible with federal law. *Pac. Gas & Elec. Co. v. State Energy Res. Conservation and Dev. Comm'n*, 461 U.S. 190, 203-04 (1983). Field preemption precludes state law when federal policy so completely occupies the regulatory territory that there is no room for additional state regulation. *Fid. Fed. Sav. & Loan Ass'n v. De la Cuesta*, 458 U.S. 141, 152-53 (1982); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230-31 (1947). "Pre-emption may result not only from action taken by Congress itself; a

federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation." *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 369 (1986).

Little attention has been paid, however, to whether only one type of preemption may be found within a given federal regulatory scheme, or whether Congress and the agencies to which it delegates authority may sometimes incorporate more than one form of preemption within the same scheme. That question is ripe for determination in this case, as that kind of limited preemption applies to roof bolting machine regulation within the broader arena of mine safety and health policy. Although in other provisions the MSHA allows for concurrent state regulation that is more stringent than federal law, it has nonetheless *completely* preempted the field of roof bolting machine regulation, thus precluding *any* state regulation regardless of whether or not it is more stringent. In other words, it has carved out an area of field preemption within a broader regime that otherwise allows for state involvement.

The West Virginia Supreme Court presumed that the inclusion of an express preemption provision within the Mine Safety and Health Act meant that field preemption principles could not apply. But this conclusion ignores the reality of the federal regulatory regime in question. Although Congress may have expressed a general desire to permit more stringent state laws in the area of mine safety and health, it also zeroed in on roof bolting machines with dry dust suppression systems and created a regulatory apparatus that leaves no room for supplementation by the states. As this Court has held, the "ultimate task in any preemption case is to determine whether state regulation is consistent with the structure and purpose of the statute as a whole" looking to "the provisions of the whole law, and to its object and policy." *Gade v. Nat'l*

Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 98 (1992). This the West Virginia Supreme Court of Appeals did not do. There is nothing inherently contradictory in finding implied field preemption for a narrow area within a broader regulatory regime that otherwise leaves room for state law. *See, e.g., Freightliner Corp. v. Myrick*, 514 U.S. 280, 288-89 (1995) (existence of express preemption provision does not foreclose implied preemption).

This Court should grant certiorari here to address the important question of whether more than one preemption principle may apply within the same regulatory regime.

B. The Federal Government Has Occupied the Field of Regulating Roof Bolting Machines

The historical review in the Statement of the Case of federal mine safety and health policy shows that roof bolting machines with dry dust suppression systems have been the subject of comprehensive and highly detailed federal regulation. This leads to the conclusion that, although Congress may have provided for complementary state regulation in some areas of mine safety and health (30 U.S.C. § 955(b) (2000)), in the discrete area of the manufacture and labeling of roof bolting machines, federal standards alone govern. 30 U.S.C. §§ 801, 811, 844 (2000); 30 C.F.R. Part 33 (2006).

Both Congress and the Mine Safety and Health Administration have left no doubt that they intend to fully occupy the field in regulating the design, manufacture and labeling of roof bolting machines. Accordingly, any additional state regulation in this area must be preempted. Through both statutory enactments and detailed regulations,

the federal government has codified requirements for roof bolting machines as to materials, design specifications, dimensions of component parts, product quality, engineering principles, dust performance, and warnings, labeling and maintenance instructions. 30 U.S.C. § 844 (2000); 30 C.F.R. Part 33 (2006). Most critically, manufacturers of roof bolting machines must obtain approval from the federal Mine Safety and Health Administration before the machines may be sold and put into use, and before any modifications may be made in models previously approved.

The United States has imposed an inspection, testing and approval system for the design, composition and use of only one underground coal mining device related to dust: the dry dust suppression system in roof bolting machines. There is no other set of regulations within Title 30 that imposes such complete control over all aspects of a product's manufacture and labeling. This provides the strongest possible evidence that federal law is intended to occupy entirely the field of regulation for these machines. Congressional intent to preempt

> may be inferred from a "scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," or where an Act of Congress "touches a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject."

English, 496 U.S. at 79, (quoting *Rice*, 331 U.S. at 230).

It would be inconsistent with the structure of this regulatory scheme to conclude that a state – whether through an agency or a jury – may establish its own set of requirements for the machines, when ultimately the federal Mine Safety and Health Administration holds the key to approval.

In many cases this Court has held that when a federal statute evinces an intent to preempt state law in an area, as it has here, it preempts not only state statutes and regulations but state common law suits asserting claims in that area as well. *Bates v. Dow Agrosciences LLC*, 544 U.S. 431 (2005); *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658 (1993); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992). Congress' clear intent to effect field preemption in the area of roof bolting machines means that Respondents' tort claims against Petitioner cannot be allowed to proceed, for any finding of tort liability as to an approved machine would by its very nature be in conflict with federal law.

II. States May Not Supplement Federal Regulations Pertaining to Roof Bolting Machines Via Tort Liability Under Principles of Conflict Preemption

Although federal regulation of roof bolting machines leaves no room for state regulation under field preemption principles, the express conflict preemption provision in the MSHA forecloses "regulation" via jury verdicts as well.

Like many federal statutes, the Mine Safety and Health Act contains a section addressing state law. That section says that any state law that conflicts with federal law in the area of mine safety and health is preempted. 30 U.S.C. § 955(a) (2000). It also provides that states may set forth laws and regulations that are more stringent than federal law, so long

as those laws and regulations do not conflict with federal law. 30 U.S.C. § 955(b) (2000).

The West Virginia Supreme Court held that it is permissible to promulgate more stringent mine safety and health rules via jury verdicts (in addition to state legislation or administrative regulation). That is error, however, because if a judge or jury finds a roof bolting machine manufacturer liable in tort when the machine has met with federal approval, that ruling would inherently conflict with federal law.

Petitioner respectfully urges this Court to hold that a state may not supplement existing federal law pertaining to roof bolting machines by means of common law developments. Even if a federal regulatory scheme allows for complementary state regulation,[1] it should do so through legislative means appropriate for promulgating new requirements that purport to bind regulated entities. Allowing ad hoc state regulation via jury verdicts will subject manufacturers to vast uncertainty and potentially punish those who have made strenuous efforts to comply with applicable federal requirements.

As this Court stated in *Geier v. Am. Honda Motor Co.*, 529 U.S. 861 (2000), the policy goal of uniformity that underlies preemption "favors preemption of state tort suits,

---

[1] As set forth in section I. *supra*, Petitioner argues that this regulatory scheme does not allow for *any* supplemental state regulation under 30 CFR Part 33, which forecloses not only jury verdicts but any form of state law encroaching upon regulation of roof bolting machines. If this Court rejects Petitioner's field preemption argument, however, it must at least find that any supplemental state regulation must take the form of a positive legislative or administrative enactment.

for the rules of law that judges and juries create or apply in such suits may themselves similarly create uncertainty and even conflict, say, when different juries in different States reach different decisions on similar facts." *Id.* at 871. Petitioner's roof bolting machines are sold and used in at least sixteen states as well as abroad; the patchwork of "regulation" to which it would be subject would be dizzying if not only the various states themselves but an untold number of juries could dictate idiosyncratic design changes in its products. This type of intrusion into an area of clear federal preemption thus would not only undermine the carefully constructed federal regulatory framework, but also have a substantial and adverse impact on commercial entities operating across multiple state lines.

The plain language of the MSHA provision authorizing more stringent state law contemplates state laws promulgated by the legislature or regulatory agencies. The statute says that "any State *law or regulation*" that provides for more stringent health and safety standards will not be construed to be in conflict with the federal statute (emphasis added). Unlike instances in which federal preemption is phrased in looser terms such as "requirements" or "standards" and such terms were construed to include common law developments,[2] Congress chose to use the words "law or regulation" in the MSHA, words which this Court has read in similar contexts to mean legislation or agency regulation, not common law.

---

[2] *See, e.g., Geier v. Am. Honda Motor Co.*, 529 U.S. 861 (2000) ("safety standard" construed to include those enumerated through tort law claims); *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658 (1993) ("law, rule, regulation, order, or standard" construed to encompass common law duties); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992) ("requirement or prohibition . . . under state law" construed to encompass common law).

See, e.g., Sprietsma v. Mercury Marine, 537 U.S. 51, 63 (2002) ("'a [state or local] law or regulation' .. . is most naturally read as not encompassing common-law claims"). Congress did not use the looser terms found in other federal preemption statutes, and it contains no savings provision expressing a preference for the continued use of tort suits to complement federal regulation.[3]

The federal regulatory apparatus governing the production and use of roof bolting machines is so comprehensive that even the labels affixed to them must win approval before the machines may be sold and used. The regulations further proscribe any alterations to previously-approved machines unless such alterations are themselves approved. *See* 30 C.F.R. § 33.12 (2006) (proposed modifications not allowed without prior approval).

It therefore defies reason to suggest that Congress intended that a jury should be allowed to determine that, despite compliance with all of the applicable federal standards, a manufacturer is nonetheless somehow negligent for failing to adhere to a more general tort standard. If such a finding of liability were to cause the manufacturer to alter the design or labeling of its product, the manufacturer would still have to submit such proposed alterations to the MSHA for approval. If that federal agency were to disagree with the jury and disallow that jury's mandated changes, what could the manufacturer, caught between Scylla and Charybdis, do? This would be a classic case of conflict preemption in which "it is impossible to comply with both state and federal law." *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984);

---

[3] *See, e.g., Sprietsma v. Mercury Marine*, 537 U.S. 51 (2002); *Geier v. Am. Honda Motor Co.*, 529 U.S. 861 (2000).

Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-143 (1963).

It is apparent that the regulatory mechanism envisioned by the West Virginia Supreme Court of Appeals just cannot work in this area. Indeed, it would be difficult to envision a clearer example of state and federal law in conflict. Accordingly, to preserve the principles of preemption, the decision below interpreting 30 U.S.C. § 955 to permit that conflict cannot stand.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

STUART M. GERSON*
STEVEN M. UMIN
JULIANNA S. GONEN
EPSTEIN BECKER & GREEN, P.C.
1227 25th Street, N.W.
Suite 700
Washington, D.C. 20037
(202) 861-0900

MICHAEL J. FARRELL
TAMELA J. WHITE
FARRELL, FARRELL & FARRELL, PLLC
914 Fifth Avenue
P.O. Box 6457
Huntington, WV 25772
(304) 522-9100

* *Counsel of Record* *Attorneys for Petitioner*

APPENDIX

APPENDIX A — OPINION OF THE SUPREME COURT OF APPEALS OF WEST VIRGINIA DECIDED DECEMBER 4, 2006

SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 33054.

Submitted: Oct. 25, 2006.
Decided: Dec. 4, 2006.

Jerrill DAVIS and Virginia Davis, et al.,

Plaintiffs

v.

EAGLE COAL AND DOCK COMPANY, et al.,

Defendants.

MAYNARD, Justice.

In this case, this Court answers two certified questions from the Circuit Court of Mingo County which we reformulate[1] as follows:

1. Are state law negligence, product liability, and breach of warranty claims against manufacturers of roof bolter dust

---

1. *See* Syllabus Point 3 of *Kincaid v. Mangum*, 189 W.Va. 404, 432 S.E.2d 74 (1993) (recognizing this Court's power to reformulate certified questions).

collection systems preempted by the Federal Mine Safety and Health Act, 30 U.S.C. §§ 801, *et seq.*?

2. Are state law failure to warn claims against manufacturers of roof bolter dust collection systems preempted by the Federal Safety and Health Act, 30 U.S.C. §§ 801, *et seq.*?[2]

For the reasons that follow, we find that state law claims are not preempted by the Mine Safety and Health Act.

---

2. The circuit court certified the following two questions:

> 1. Whether a determination of liability predicated on a roof bolter dust collection system design that has not been heretofore deemed permissible by MSHA/Secretary of Labor or which has not been heretofore otherwise approved by MSHA/Secretary of Labor is subject to preemption by virtue of the conflict between such a judicial determination and 30 U.S.C.A § 844 and/or the occupation of the field of roof bolter dust collection system design by Federal regulatory authorities.
>
> The circuit court answered this question in the affirmative.
>
> 2. Whether a determination of liability predicated on a failure to warn relating to a roof bolter's dust collection system via a warning not specifically prescribed by MSHA/Secretary of Labor is subject to preemption by virtue of the conflict between such a judicial determination and 30 U.S.C.A § 811 and/or occupation of the field of roof bolter dust collection system and dust control warnings by Federal regulatory authorities.
>
> The circuit court also answered this question in the affirmative.

Appendix A

I.

FACTS

The plaintiffs in several cases below were employed in various coal mining operations and now suffer from silicosis. There are several defendants below but the only one pertinent to these certified questions is J.H. Fletcher & Co., a manufacturer of roof bolters.

A roof bolter is a piece of heavy machinery that drills holes in the top of the coal mine shaft and then inserts bolts to prevent the roof of the mine shaft from collapsing on underground coal miners. These roof bolting machines are equipped with what is known as an integral dry dust suppression system (hereinafter "dust collector," "dust collection unit" or "dust collection system") the purpose of which is to collect silica released by the roof bolter's drilling and contain the dust in a filtration system to prevent coal miners from inhaling the dust.[3]

These dust collectors are heavily regulated by the federal Mine Safety and Health Administration (hereinafter "MSHA") under the federal Mine Safety and Health Act

---

3. 30 C.F.R. § 33.2(e) defines "Dust-collector unit" as "a complete assembly of parts comprising apparatus for collecting the dust that results from drilling in rock in coal mines, and is independent of the drilling equipment." According to 30 C.F.R. § 33.2(g), "dust-collecting system means an assembly of parts comprising apparatus for collecting the dust that results from drilling in rock and is dependent upon attachment to other equipment for its operation."

(hereinafter "the Act") and its accompanying regulations which are detailed and comprehensive. Only dust collectors that meet all of the federal standards are certified as "permissible" for use in coal mines.[4] In order to obtain certification of a dust collector, a manufacturer must furnish a complete unit or system to the federal government for inspection and testing.[5] The government does not "test or investigate any dust collector that in its opinion is not constructed of suitable materials, that evidences faulty workmanship, or that is not designed upon sound engineering principles."[6] Finally, all end-product dust collector designs submitted are tested by the government to ensure that they meet a specific performance standard. This standard is based, in part, on whether the dust collector prevents the dissemination of harmful amounts of dust into the air.[7]

---

4. The regulations governing dust collection systems are found in 30 C.F.R. §§ 33.1-33.38. According to § 33.1, in part, "[t]he regulations in this part set forth the requirements for dust collectors used in connection with rock drilling in coal mines to procure their certification as permissible for use in coal mines." "Permissible" means that the dust collector "conforms to the requirements of [Part 33], and that a certificate of approval to that effect has been issued." 30 C.F.R. § 33.2(a).

5. 30 C.F.R. § 33.6(g).

6. 30 C.F.R. § 33.20(a).

7. According to 30 C.F.R. § 33.20(b),

> Adequacy of design and construction of a unit or system will be determined in accordance with its ability (1) to

(Cont'd)

Appendix A

Upon completing its testing of individual dust collectors, MSHA issues either a certificate of approval or a notice of disapproval.[8] A government-approved label is then placed on the certified unit, the content and location of which are controlled by federal regulations.[9] Finally, a party cannot

---

(Cont'd)

> prevent the dissemination of objectionable or harmful concentrations of dust into a mine atmosphere, and (2) to protect against explosion and/or fire hazards of electrical equipment, except as provided in § 33.38(b).
>
> Concerning what constitutes objectionable or harmful concentrations of dust, 30 C.F.R. § 33.33(b) provides that "[u]nder each prescribed test condition, the net concentration of airborne dust at each drill operator's position shall not exceed 10 million particles (5 microns or less in diameter) per cubic foot of air[.]"

8. 30 C.F.R. § 33.10.

9. 30 U.S.C. § 811(a)(7) provides that,

> Any mandatory health or safety standard promulgated under this subsection shall prescribe the use of labels or other appropriate forms of warning as are necessary to insure that miners are apprised of all hazards to which they are exposed, relevant symptoms and appropriate emergency treatment, and proper conditions and precautions of safe use or exposure.

According to 30 C.F.R. § 33.9, in part:

> Certified dust-collecting systems shall bear labels or tags which shall contain the following: "Performance-tested

(Cont'd)

Appendix A

(Cont'd)

Dust Collecting, System, MSHA File No. P/T __," and name of manufacturer, identifying numbers of the dust-collector parts, and description of the limitations for which performance is certified. MSHA will assign a P/T file number in the certification letter.

Further, 30 C.F.R. § 33.11 indicates that,

(a) A certificate of approval will be accompanied by a photograph of a design for an approval plate, bearing the emblem of the Mine Safety and Health Administration, the name of the applicant, the name of the unit, the approval number or space for the approval number (or numbers if permissibility if electrical parts is involved), spaces for the type and the serial numbers of the unit, conditions of approval, and identifying numbers of the dust collector parts. When deemed necessary by MSHA, an appropriate statement shall be added, giving the precautions to be observed in maintaining the unit in an approved condition.

(b) An approval plate for a unit designed for use in a nongassy coal mine shall state that any electrical parts are not certified for use in a gassy coal mine. (See § 33.38(c).)

(c) The applicant shall reproduce the design either as a separate plate or by stamping or molding it in some suitable place on each unit to which it relates. The size, type, and method of attaching and location of an approval plate are subject to the approval of MSHA. The method of affixing the plate shall not impair the dust-collection or explosion-proof features of the unit.

(Cont'd)

unilaterally change any design, material, specification or use instruction of a certified dust collector unit or system without MSHA's prior approval.[10]

(Cont'd)

(d) The approval plate identifies the unit, to which it is attached, as permissible, and is the applicant's guarantee that the unit complies with the requirements of this part. Without an approval plate, no unit has the status of 'permissible' under the provisions of this part.

(e) Use of the approval plate obligates the applicant to whom the certification of approval was granted to maintain the quality of each unit bearing it and guarantees that it is manufactured and assembled according to the drawings and specifications upon which a certificate of approval was based. Use of the approval plate is not authorized except on units that conform strictly with the drawings and specifications upon which the certificate of approval was based.

10. 30 C.F.R. § 33.12 provides:

If an applicant desires to change any feature of a certified unit or system, he shall first obtain MSHA's approval of the change, pursuant to the following procedure:

(a)(1) Application shall be made as for an original certificate, requesting that the existing certification be extended to cover the proposed changes, and shall be accompanied by drawings, specifications, and related data showing the changes in detail. . . .

(b) The application will be examined by MSHA to determine whether inspection and testing will be

(Cont'd)

Appendix A

The plaintiffs allege in their actions against the defendant that the dust collection systems failed to protect the roof bolter operators from silica dust released during the machines' operations, and that any warnings pertaining to silica dust as a result of operating the machines were inadequate. The defendant subsequently moved, pursuant to West Virginia Rule of Civil Procedure 12(b)(6), for dismissal of the plaintiffs' actions based, among other things, on the defendant's claim that any state law is preempted by federal law.[11]

(Cont'd)

> required. Testing will be necessary if there is a possibility that the modification may affect adversely the performance of the unit or system. MSHA will inform the applicant whether such testing is required and the components or materials to be submitted for that purpose.
>
> (c) If the proposed modification meets the requirements of this part and Part 18 of Subchapter D of this chapter if applicable, a formal extension of certification will be issued, accompanied by a list of new and corrected drawings and specifications to be added to those already on file as the basis for the extension of certification.

11. We have previously recognized that, pursuant to W. Va.Code § 58-5-2 (1998), a question of law arising from a challenge of the sufficiency of a pleading may be certified to this Court. Further, the purpose of a motion to dismiss under Rule 12(b)(6) is to test the formal sufficiency of the complaint. Therefore, a question of law arising from a Rule 12(b)(6) motion is appropriate for certification. *See Zelenka v. City of Weirton,* 208 W.Va. 243, 539 S.E.2d 750 (2000).

Appendix A

By order dated June 17, 2005, the circuit court certified the issue of federal preemption to this Court.[12] As noted above, the circuit court found that federal law preempts the plaintiffs' claims.[13]

---

12. Concerning the circuit court's and this Court's authority to determine the existence of federal preemption in this case, we have held that, "West Virginia state courts have subject matter jurisdiction over federal preemption defenses." Syllabus Point 3, *State ex rel. Orlofske v. City of Wheeling*, 212 W.Va. 538, 575 S.E.2d 148 (2002).

13. In answering the certified questions, the circuit court reasoned, in part, as follows:

> Before a dust collector . . . system can be used in an underground coal mine, MSHA must approve it as "permissible." The Agency has promulgated comprehensive regulations in the Code of Federal Regulations regarding the control of dust caused by roof drilling, the design of permissible dust collectors, warnings associated with the dust hazard in an underground coal mine or any other aspect of this "field of regulation." 30 C.F.R. § 33.1 to 33.38.
>
> Even though the Court finds that Congress has legislated comprehensively to occupy the entire field of regulation relating to the design of dust collecting systems and warnings, the Court recognizes that the state has the right to supplement federal law. However, West Virginia has not added to or otherwise supplemented these regulations; plaintiffs do not point to any applicable state statute or regulation applicable to their claims against Fletcher.

(Cont'd)

Appendix A

(Cont'd)

Because all of the claims asserted by plaintiffs against Fletcher-product design and failure to warn-are predicated upon a theory that the dust collecting system incorporated into the Fletcher roof bolting machine was defective, these cases qualify for application of the second prong of the doctrine of implied preemption. Congress expressly reserved unto itself the form and substance of "labels or other appropriate forms or warnings as are necessary to insure that miners are apprised of all hazards to which they are exposed" with respect to the exposure to hazardous dust in an underground coal mine. 30 U.S.C. § 811.

Further, because plaintiffs allege use issues such as clogged drill steels, hoses and filters, the Court also relies upon and concludes that 30 C.F.R. § 33.11(a) applies to the duty to warn issue when it provided: "When deemed necessary by MSHA, an appropriate statement shall be added, giving precautions to be observed in maintaining the unit in an approved condition." The Court observes that this same regulation requires: "[a] certificate of approval will be accompanied by a photograph of a design for an approval plate, bearing the emblem of the Mine Safety and Health Administration, the name of the applicant, the name of the unit, the approval number or space for the approval number (or numbers if permissibility of electrical parts is involved) spaces for the type and the serial numbers of the unit, conditions of approval and identifying numbers of the dust collector parts." 30 C.F.R. § 33.11(a).

A state law, derived from a verdict in one or more of these cases, would conflict with federal law regarding

(Cont'd)

Appendix A

II.

STANDARD OF REVIEW

It is well settled that this Court's review of a circuit court's answer to a certified question is *de novo*. *See* Syllabus Point 1, *Gallapoo v. Wal-Mart Stores, Inc.*, 197 W.Va. 172, 475 S.E.2d 172 (1996) (holding that "[t]he appellate standard of review of questions of law answered and certified by a circuit court is *de novo*").

III.

DISCUSSION

The authority of federal law to preempt state law is found in the United States Constitution in what is known as the Supremacy Clause which provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in

---

(Cont'd)

> the design of the dust collecting system and warnings because it would be impossible to comply with both and because state law stands as an obstacle to the accomplishment and execution of congressional objectives. (Citations omitted).

> the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. art. VI, cl. 2. This Court has held that "[t]he Supremacy Clause of the United States Constitution, Article VI, Clause 2, invalidates state laws that interfere with or are contrary to federal law." Syllabus Point 1, *Cutright v. Metropolitan Life Ins. Co.*, 201 W.Va. 50, 491 S.E.2d 308 (1997).

It is also true, however, that "[o]ur law has a general bias against preemption." *General Motors Corp. v. Smith*, 216 W.Va. 78, 83, 602 S.E.2d 521, 526 (2004). "[B]oth this Court and the U.S. Supreme Court have explained that federal preemption of state court authority is generally the exception, and not the rule." *In re: West Virginia Asbestos Litigation*, 215 W.Va. 39, 42, 592 S.E.2d 818, 821 (2003). "Given the importance of federalism in our constitutional structure . . . we entertain a strong presumption that federal statutes do not preempt state laws; particularly those laws directed at subjects-like health and safety-'traditionally governed' by the states." *Law v. General Motors Corp.*, 114 F.3d 908, 909-910 (9th Cir.1997),*quoting CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664, 113 S.Ct. 1732, 1737, 123 L.Ed.2d 387 (1993). Therefore, "preemption is disfavored in the absence of convincing evidence warranting its *86 application." *Hartley Marine Corp. v. Mierke*, 196 W.Va. 669, 673, 474 S.E.2d 599, 603 (1996). Said another way, "pre-emption will not lie unless it is 'the clear and manifest purpose of Congress.' " *Law*, 114 F.3d at 910, *quoting Easterwood, id.* For these reasons, "[c]onsideration under the Supremacy Clause starts with the basic assumption that Congress did

not intend to displace state law." *State ex rel. Orlofske v. City of Wheeling,* 212 W.Va. 538, 543, 575 S.E.2d 148, 153 (2002), *quoting Maryland v. Louisiana,* 451 U.S. 725, 746, 101 S.Ct. 2114, 2129, 68 L.Ed.2d 576, 595 (1981).

This Court has previously recognized that "[i]n any preemption analysis, the focus of the inquiry is on congressional intent." *Hartley Marine Corp.,* 196 W.Va. at 674, 474 S.E.2d at 604 (citations omitted). We have also explained that "[p]reemption may either be explicit, *i.e.,* set forth in the federal statute, or implied." *In re: West Virginia Asbestos Litigation,* 215 W.Va. at 43, 592 S.E.2d at 822. Implied preemption may take two forms.

> [I]n the absence of explicit statutory language signaling an intent to pre-empt, we infer such intent where Congress has legislated comprehensively to occupy an entire field of regulation, leaving no room for the states to supplement federal law, or where the state law at issue conflicts with federal law, either because it is impossible to comply with both or because the state law stands as an obstacle to the accomplishment and execution of congressional objectives[.]

Hartley Marine Corp., 196 W.Va. at 674, 474 S.E.2d at 604, *quoting Northwest Cent. Pipeline Corp. v. Kansas Corp. Comm'n,* 489 U.S. 493, 509, 109 S.Ct. 1262, 1273, 103 L.Ed.2d 509 (1989).

Appendix A

The defendant argues first that field preemption exists in the instant case. Specifically, the defendant opines in its brief to this Court that,

> compliance with 30 U.S.C.A. § 844[14] and [30 C.F.R. §§ 33.1- 33.38] constitutes field preemption. Federal authority completely occupies the field of law with respect to roof bolters and respirable dust exposures by the foregoing and by the fact that manufacturers are prohibited from making *any* design, instruction, labeling, component part or any other change without first having MSHA's approval. 30 C.F.R. § 33.12.[15] . . . Because Congress and MSHA has

---

14. According to 30 U.S.C. § 844,

> The dust resulting from drilling in rock shall be controlled by the use of permissible dust collectors, or by water or water with a wetting agent, or by ventilation, or by any other method or device approved by the Secretary which is at least as effective in controlling such dust. Respiratory equipment approved by the Secretary and the Secretary of Health and Human Services shall be provided persons exposed for short periods to inhalation hazards from gas, dusts, fumes, or mist. When the exposure is for prolonged periods, other measures to protect such persons or to reduce the hazard shall be taken.

15. According to 30 C.F.R. § 33.12, in part, "[i]f an applicant desires to change any feature of a certified unit or system, he shall first obtain MSHA's approval of the change[.]"

> [sic] completely occupied the field of regulation as to this product, any State damages action would directly conflict with the same. This conflict is expressly prohibited. [30 U.S.C.A. § 955] (footnotes added).

We disagree with the defendant and find that field preemption does not exist in this case. As stated above, preemption is only to be inferred "[i]n the absence of explicit statutory language signaling an intent to pre-empt." *Hartley Marine Corp.*, 196 W.Va. at 674, 474 S.E.2d at 604. In the instant case, however, there is explicit statutory language signaling Congress's intent to preempt state law insofar as it conflicts with federal law. This explicit statutory language is found in 30 U.S.C. § 955 which states:

> (a) No State law in effect on December 30, 1969 or which may become effective thereafter shall be superseded by any provision of this chapter or order issued or any mandatory health or safety standard, except insofar as such State law is in conflict with this chapter or with any order issued or any mandatory health or safety standard.
>
> (b) The provisions of any State law or regulation in effect upon the operative date of this chapter, or which may become effective thereafter, which provide for more stringent health and safety standards applicable to coal or other mines than do the provisions of this chapter or any order issued or any mandatory health or safety standard shall not thereby be construed or held to be in

> conflict with this chapter. The provisions of any State law or regulation in effect December 30, 1969, or which may become effective thereafter, which provide for health and safety standards applicable to coal or other mines for which no provision is contained in this chapter or in any order issued or any mandatory health or safety standard, shall not be held to be in conflict with this chapter.

Therefore, because Congress has clearly expressed its intent not to preempt all state law or to occupy the entire field, we conclude that field preemption does not exist in this case.

Second, the defendant asserts that express preemption exists which is indicated by Congress's promulgation of regulations that specify the design, engineering, construction, and performance criteria for dust collectors. Essentially, the defendant's argument hinges on the fact that the federal regulations are detailed, comprehensive, and mandatory. According to the defendant, a fair reading of this comprehensive regulatory scheme leads to the inescapable conclusion that Congress clearly intended to preempt state laws pertaining to dust collectors.

We find no merit to the defendant's argument. Again, because Congress included an express preemption provision in the Mine Safety and Health Act, this Court does not find it necessary to infer Congressional intent from regulations that do not specifically address preemption. According to the clear provisions of § 955(a), only state laws that are in

conflict with the federal standards for permissible dust collectors are superseded by the federal standards. Further, pursuant to the plain language of § 955(b), state laws or regulations that provide for more stringent health and safety standards than do the federal provisions shall not be construed to be in conflict with those provisions. It is obvious to this Court from the clear language in § 955(a) and (b) that Congress did not intend to preempt State laws that provide for more stringent health and safety standards than the federal laws. Therefore, we find that Congress did not intend to preempt state law claims that may hold the defendant's dust collection system to a more stringent standard than federal law.

The defendant contends, however, that paragraph (b) of § 955 is not applicable to its dust collection system. The defendant points out that § 955(b) applies specifically to health and safety standards "applicable to coal or other mines," which, says the defendant, refers to the property from which coal is mined and not to manufacturers of dust collectors. We decline to read the language of § 955(b) so narrowly. According to 30 U.S.C. § 802(h)(1), "coal or other mine" means, among other things, "equipment" and "machines" "used in, or to be used in ... the work of extracting ... minerals." A roof bolter with a dust collection system is a piece of equipment or machinery used in the work of mining underground coal. Specifically, it makes the underground mining of coal possible by preventing roof collapses. It also makes the job of mining underground coal safer by limiting the amount of respirable dust in the air

resulting from roof bolting operations.[16] But even absent the definition of the language "coal or other mine" in 30 U.S.C. § 802(h)(1), it is apparent to this Court that any common sense construction of the phrase "applicable to coal or other mines" includes machinery, such as a roof bolter, which is integral to underground mining operations. Thus, we find no reason, in the absence of express language to the contrary, to exclude roof bolters from the application § 955(b).

The defendant further avers that state law pertaining to dust collectors is preempted under the principles of conflict preemption. Specifically, according to the defendant, the distinction between 30 U.S.C. § 955(a) and (b) "spells out the clear and firm expression of Congressional intent to preserve conflict preemption principles for a narrow category of persons and entities involved in the mining industry, other than coal or other mines." The defendant apparently defines the term "conflict" for the purposes of conflict preemption to mean "different." In other words, according to the defendant, any state law or jury verdict requiring a *different* standard than that set forth in federal law is preempted. The defendant supports this proposition by citing specific language in both the Act and its accompanying federal regulations. For example, the defendant cites 30 U.S.C. § 811(a)(6)(A) which provides:

---

16. It is also the contention of the defendant that absent the distinction between § 955(a) and § 955(b), there would have been no reason for Congress to have enacted both subsections (a) and (b). We disagree. We believe instead that when the subsections are read *in pari materia*, subsection (a) sets forth the general rule that state laws not in conflict with federal law are not superseded, and subsection (b) defines what constitutes "conflict" under subsection (a).

Appendix A

> The Secretary, in promulgating mandatory standards dealing with toxic materials or harmful physical agents under this subsection, shall set standards which most adequately assure on the basis of the best available evidence that no miner will suffer material impairment of health or functional capacity even if such miner has regular exposure to the hazards dealt with by such standard for the period of his working life. Development of mandatory standards under this subsection shall be based upon research, demonstrations, experiments, and such other information as may be appropriate. In addition to the attainment of the highest degree of health and safety protection for the miner, other considerations shall be the latest available scientific data in the field, the feasibility of the standards, and experience gained under this and other health and safety laws. Whenever practicable, the mandatory health or safety standard promulgated shall be expressed in terms of objective criteria and of the performance desired.

It is the defendant's position that the use of the term "mandatory" in this code section indicates that any state law or jury verdict that deviates from the federal standards is preempted. We reject the defendant's reasoning.

This Court has explained that "conflict preemption[ ] [occurs] where 'compliance with both federal and state regulations is a physical impossibility,' or where state law

'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress[.]" *Hartley Marine Corp.*, 196 W.Va. at 674, 474 S.E.2d at 604, *citing Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88, 98, 112 S.Ct. 2374, 2383, 120 L.Ed.2d 73 (1992). We do not believe that the defendant's compliance with both a jury verdict that requires more stringent standards than federal law and its compliance with less stringent federal standards is a physical impossibility. Logically, compliance with a more stringent state standard also indicates compliance with a less stringent federal standard.

Further, we do not believe that a jury verdict requiring a different standard than that set forth in the federal regulations would frustrate the objectives and execution of the federal standard. The purposes of the Mine Safety and Health Act are spelled out in 30 U.S.C. § 801(g), which provides,

> it is the purpose of this chapter (1) to establish interim mandatory health and safety standards and to direct the Secretary of Health and Human Services and the Secretary of Labor to develop and promulgate improved mandatory health or safety standards to protect the health and safety of the Nation's coal or other miners; (2) to require that each operator of a coal or other mine and every miner in such mine comply with such standards; (3) to cooperate with, and provide assistance to, the States in the development and enforcement of effective State coal or other mine health and safety programs; and (4) to improve and expand, in cooperation with the States and

> the coal or other mining industry, research and development and training programs aimed at preventing coal or other mine accidents and occupationally caused diseases in the industry.

This Court fails to see how state enforcement of a more stringent standard pertaining to dust collectors would frustrate these purposes. Essentially, "the purpose of the Federal*89 Coal Mine Health and Safety Act is to protect the safety of the miner." *Westmoreland Coal Co. v. Federal Mine, Etc.*, 606 F.2d 417, 419-420 (4th Cir.1979), *see also Estate of Bernaldes v. U.S.*, 877 F.Supp. 301, 308 (W.D.Va.1995), *affirmed*, 81 F.3d 428 (4th Cir.1996) (recognizing that "protecting the health and safety of the nation's coal miners is one of the purposes of the Act"). Quite frankly, it seems to us that enforcement of a more stringent standard governing dust collectors would have the effect of better protecting the health and safety of miners by further limiting the amount of respirable silica that they breathe while operating roof bolters. Accordingly, we conclude that conflict preemption does not operate to prevent state law claims against the defendant.

Next, the defendant posits that this Court's decision in *In re: West Virginia Asbestos Litigation*, in which we found that state tort law claims against manufacturers of parts or components of railroad locomotives are preempted by the federal Locomotive Boiler Inspection Act, § 20701, *et seq.* supports a finding of preemption in the instant case. According to the defendant, the inspection, testing, approval, and performance regulations for dust collectors are more

precise, detailed, and onerous than the regulations in the railroad preemption cases.

This Court does not believe that *In re: West Virginia Asbestos Litigation* is analogous to the present case. First, as seen above, the Mining Safety and Health Act has an express preemption provision that expressly preserves state laws that do not conflict with federal law. In contrast, the Locomotive Inspection Act is silent on preemption.[17] Moreover, an important practical basis for finding implied preemption in railroad cases is the unique interstate nature of the railroad business.

This broad preemptive sweep is necessary to maintain uniformity of railroad operating standards across state lines. Locomotives are designed to travel long distances, with most railroad routes wending through interstate commerce. The virtue of uniform national regulation "is self-evident: locomotive companies need only concern themselves with

---

17. In its brief, the defendant, in its discussion of *In re: West Virginia Asbestos Litigation,* points out that the preemption clause in the Federal Railroad Safety Act, 49 U.S.C. §§ 20101, *et seq.*, like the preemption clause in the Mine Safety and Health Act, expressly recognizes conflict preemption. Significantly, however, *In re: West Virginia Asbestos Litigation* concerned preemption under the Locomotive Inspection Act and not the Railroad Safety Act. Courts have found that "Congress did not intend the preemption provision of the Railroad Safety Act to modify the total-preemptive effect of the Locomotive Inspection Act." *Consol. Rail Corp. v. Pennsylvania Pub. Util.*, 536 F.Supp. 653, 657 (E.D.Pa.1982), *affirmed,* 696 F.2d 981 (3rd Cir.1982), *affirmed,* 461 U.S. 912, 103 S.Ct. 1888, 77 L.Ed.2d 280 (1983).

one set of equipment regulations and need not be prepared to remove or add equipment as they travel from state to state." *Southern Pac. Transp. Co. v. Oregon PUC*, 9 F.3d 807, 811 (9th Cir.1993); *see also R.J. Corman R.R. v. Palmore*, 999 F.2d 149, 152 (6th Cir.1993) ("Th[e] lasting history of pervasive and uniquely-tailored congressional action indicates Congress's general intent that railroads should be regulated primarily on a national level through an integrated network of federal law."). . . .

> . . . the purpose of tort liability is to induce defendants to conform their conduct to a standard of care established by the state. *See San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 247, 79 S.Ct. 773, 780-81, 3 L.Ed.2d 775 (1959) ("The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy.").... If each state were to adopt different liability-triggering standards, manufacturers would have to sell locomotives and cars whose equipment could be changed as they crossed state lines, or adhere to the standard set by the most stringent state.

Law, 114 F.3d 908, 910-11. These same considerations do not apply to the dust collectors at issue.

The defendant further argues that its faithful compliance with all of the federal standards that regulate dust collectors should shield it from claims that its dust collectors are defective. While this Court agrees that compliance with

federal standards is compelling evidence on the defendant's behalf in any state law claim,[18] such claims are not completely foreclosed. As set forth above, Congress has clearly expressed its intent that states may adopt more stringent standards than those found in the Mining Safety and Health Act. This Court must give effect to Congressional intent. Moreover, we are confident that our decision herein supports the compelling public policy of encouraging manufacturers of dust collection units to continually strive to make those units safer than what is currently required by the federal Act.

Finally, the defendant opines that state law cannot require a more demanding standard governing dust collectors because federal regulations represent "the gold standard." We believe that to accept the defendant's argument is to deny the possibility of technological progress in the manufacture of dust collectors. Technology that represented the gold standard a short time ago may no longer represent the gold standard today. The federal regulations themselves recognize that "all possible designs, arrangements, or combinations of components and materials [of dust collectors] cannot be foreseen." 30 C.F.R. § 33.20. We believe that by permitting states to adopt more stringent dust collector standards than those found in the federal regulations, Congress has implicitly recognized that dust collector systems may be manufactured that actually exceed federal safety regulations.[19]

---

18. *See* footnote 17, *infra.*

19. The defendant also supports it argument in favor of preemption by asserting that no state, including West Virginia, has ever adopted a law or regulation regarding the performance, testing, (Cont'd)

In sum, after reviewing the language of the Mine Safety and Health Act and its accompanying regulations, we conclude that our basic presumption that Congress did not intend to displace state law has not been rebutted by convincing evidence to the contrary. Quite simply, we do not believe that Congress's purpose to preempt all state law regulating dust collectors is clear and manifest. Accordingly, we hold that state tort law, product liability, breach of warranty, and failure to warn claims against manufacturers of roof bolter dust collection systems are not preempted by the Federal Mine Safety and Health Act, 30 U.S.C. § 801, *et seq.*[20]

(Cont'd)
approval, or certification of dust collectors. In light of our reading of the Mine Safety and Health Act to indicate that states may adopt laws or regulations that are more stringent than the federal Act, we do not find the fact that states have not adopted more stringent regulations to be legally significant.

20. This Court wishes to emphasize that our sole task in this case is to decide the narrow legal issue of federal preemption and not to determine whether the plaintiffs can actually maintain an action against the defendant. At this point in the litigation below, evidence has not yet been adduced and we essentially have only the bare allegations of the parties. We note, however, that if the defendant is able to show that it complied with all applicable federal regulations in the manufacture of its dust collector units, this showing may be a compelling defense to the claims of the plaintiffs.

IV.

CONCLUSION

For the reasons stated above, we answer the reformulated certified questions as follows:

1. Are state law negligence, product liability, and breach of warranty claims against manufacturers of roof bolter dust collection systems preempted by the Federal Mine Safety and Health Act, 30 U.S.C. §§ 801, *et seq.*?

Answer: No.

2. Are state law failure to warn claims against manufacturers of roof bolter dust collection systems preempted by the Federal Mine Safety and Health Act, 30 U.S.C. §§ 801, *et seq.*?

Answer: No.

Certified questions answered.

APPENDIX B — ORDER OF THE CIRCUIT COURT OF MINGO COUNTY, WEST VIRGINIA CERTIFYING QUESTIONS TO THE WEST VIRGINIA SUPREME COURT OF APPEALS ENTERED JUNE 17, 2005

IN THE CIRCUIT COURT OF MINGO COUNTY, WEST VIRGINIA

Civil Action No. 04-C-140
Hon. Michael Thornsbury, Judge

JERRIL DAVIS and VIRGINIA DAVIS,

Plaintiffs,

v.

EAGLE COAL AND DOCK COMPANY, et al.

Defendants.

Civil Action No. 04-C-222
Hon. Michael Thornsbury, Judge

DAVID HOLDREN and SHARON HOLDREN,

Plaintiffs,

v.

MABEN ENERGY CORPORATION, et al.

Defendants.

Appendix B

Civil Action No. 04-C-223
Hon. Michael Thornsbury, Judge

SAMUEL E. COAKLEY and BARBARA COAKLEY,

Plaintiffs,

v.

WESTMORELAND COAL COMPANY, et al.

Defendants.

Civil Action No. 04-C-289
Hon. Michael Thornsbury, Judge

RICKY PRINCE and DIANA PRINCE,

Plaintiffs,

v.

EASTERN ASSOCIATED COAL CORP., et al.

Defendants.

Civil Action No. 04-C-322
Hon. Michael Thornsbury, Judge

DAVID JOHNSON and JUDY JOHNSON,

Plaintiffs,

v.

ISLAND CREEK COAL COMPANY, et al.

Defendants.

Appendix B

Civil Action No. 04-C-307
Hon. Michael Thornsbury, Judge

DOUGLAS MULLINS and WILMA MULLINS,

Plaintiffs,

v.

J.H. FLETCHER & CO., et al.

Defendants.

Civil Action No. 04-C-308
Hon. Michael Thornsbury, Judge

GLEN MOORE and IRENE MOORE,

Plaintiffs,

v.

J.H. FLETCHER & CO., et al.

Defendants.

Appendix B

ORDER CERTIFYING QUESTIONS TO THE WEST VIRGINIA SUPREME COURT OF APPEALS

Findings of Fact

The plaintiffs in these cases contend that they were exposed to silica dust while they were employed in various coal mining operations and now suffer from a lung disease known as Silicosis. Silica is not present in every coal mine, but it is alleged to have been present in all of the mines in which the plaintiffs work. Silica dust is created during the roof bolting process: a hole is drilled into the mine roof and a bolt is inserted to secure the mining area to prevent roof falls and other incidents. During the drilling, the above layers of rock and material are disturbed. Often these layers include silica-based minerals such as sandstone, and thus silica dust may be introduced into the work environment.

The plaintiffs have asserted a product liability claim against defendant J.H. Fletcher & Co. ("Fletcher"), a manufacturer of roof bolting machines. Plaintiffs allege the Fletcher machines were defective because they failed to protect the machine operators from the silica dust released during the mining operations. Specifically, the dust collection systems and the warnings relevant to silica dust as a result of operating a Fletcher machine were inadequate.

Fletcher contends that Federal Law strictly regulates the design, manufacture, and operation of its equipment, and thus, under the doctrine of preemption, it cannot be subject to a determination of liability under West Virginia statutory or common law. Accordingly, Fletcher moves to dismiss the claims against it pursuant to W.Va.R.Civ.P. 12 (c).

Appendix B

Fletcher's argument is as follows: The United States Department of Labor, Mine Health and Safety Administration ("MSHA" or "Agency") prohibits the use of any roof bolting machine unless its dust collection system has been approved by the Agency. Further, the subject of dust hazards has been comprehensively regulated by the United States. 30 U.S.C. §§ 811, 844, 845 and 863; 30 C.F.R. § 33.1 to 33.38. West Virginia has not supplemented these statutes and regulations with any corresponding or additional state provisions, even though it has had the opportunity. Therefore, the "sole source for defining state law would be a trial verdict adverse to Fletcher." Such a determination would necessarily be based upon a state common law doctrine concerning alternative design of the dust collection system, or a common law failure to warn. Compliance with state common law regarding dust collecting systems would frustrate and be at odds with the objectives of Congress as set forth in the federal statutes and regulations, and is therefore impermissible.

Plaintiffs counter that the holding in *United Mine Workers of America v. Miller*, 170 W.Va. 177, 291 S.E.2d 673 (1982) recognizes that civil actions under the Federal Mine Safety and Health Act are allowed. Plaintiffs also cite to cases where compliance with federal labeling guidelines for other products were followed, yet tort claims were permitted to proceed. See, e.g., *Mazur v. Merck Co.*, 742 F.Supp. 239 (E.D.Pa. 1990).

Appendix B

Conclusions of Law

The Supremacy Clause of the United States Constitution, Article IV, Clause 2, invalidates state laws that interfere with or are contrary to federal law. *In Re: West Virginia Asbestos Litigation*, 215 W.Va. 39, 592 S.E.2d 818 (2003). In enacting the applicable legislation, Congress required the United States Secretary of Labor to "develop, promulgate, and revise as may be appropriate, improved mandatory health or safety standards for the protection of life and prevention of injuries in coal and other mines." 30 U.S.C. § 811

Moreover, Congress has comprehensively legislated regarding the health and safety of coal miners. 30 U.S.C. § 801. Congress expressly declared its intent at 30 U.S.C. § 801(a-g): Congress declares that:

a. the first priority and concern of all in the coal and other mining industry must be health and safety of the most precious resource – the miner;

b. deaths and serious injuries from unsafe and unhealthful conditions and practices in the coal and other mines cause grief and suffering to the miners and to their families;

c. there is an urgent need to provide a more effective means and measures for improving the working conditions and practices in the Nation's coal or other mines in order to prevent death and serious physical harm, and in order to prevent occupational diseases originating in such mines;

d. the existence of unsafe and unhealthful conditions and practices in the Nation's coal or other mines is a serious impediment to the future growth of the coal or other mining industry and cannot be tolerated;

e. the operators of such mines with the assistance of the miners have the primary responsibility to prevent the existence of such conditions and practices in such mines;

f. the disruption of production and the loss of income to operators and miners as a result of coal or other mine accidents or occupationally caused diseases unduly impedes and burdens commerce; and

g. it is the purpose of this chapter (1) to establish interim mandatory health and safety standards and to direct the Secretary of Health and Human Services and the Secretary of Labor to develop and promulgate improved mandatory health or safety standards to protect the health and safety of the Nation's coal and other miners; (2) to require that each operator of a coal or other mine and every miner in such mine comply with such standards; (3) to cooperate with, and safety programs; and (4) to improve and expand, in cooperation with the States and the coal or other mining industry, research and development and training programs aimed at preventing coal or other mine accidents and occupationally caused diseases in the industry.

Based upon the foregoing language, it is clear that Congress intended to occupy this field of regulation.

Appendix B

Before a dust collector or dust collection system can be used in an underground coal mine, MSHA must approve it as "permissible." The Agency has promulgated comprehensive regulations in the Code of Federal Regulations regarding the control of dust caused by roof drilling, the design of permissible dust collectors, warnings associated with the dust hazard in an underground coal mine or any other aspect of this "field of regulation." 30 C.F.R. § 33.1 to 33.38.

Even though the Court finds that Congress has legislated comprehensively to occupy the entire field of regulation relating to the design of dust collecting systems and warnings, the Court recognizes that the state has the right to supplement federal law. However, West Virginia has not added to or otherwise supplemented these regulations; plaintiffs do not point to any applicable state statute or regulation applicable to their claims against Fletcher.

Because all of the claims asserted by plaintiffs against Fletcher — product design and failure to warn — are predicated upon a theory that the dust collecting system incorporated into the Fletcher roof bolting machine was defective, these cases qualify for application of the second prong of the doctrine of implied preemption. Congress expressly reserved unto itself the form and substance of "labels or other appropriate forms or warnings as are necessary to insure that miners are apprised of all hazards to which they are exposed" with respect to the exposure to hazardous dust in an underground coal mine. 30 U.S.C. § 811.

Further, because plaintiffs allege use issues such as clogged drill steels, hoses and filters, the Court also relies upon and concludes that 30 C.F.R. § 33.11(a) applies to the duty to warn issue when it provided: "When deemed necessary by MSHA, an appropriate statement shall be added, giving the precautions to be observed in maintaining the unit in an approved condition." The Court observes that this same regulation requires: "[a] certificate of approval will be accompanied by a photograph of a design for an approval plate, bearing the emblem of the Mine Safety and Health Administration, the name of the applicant, the name of the unit, the approval number or space for the approval number (or numbers if permissibility of electrical parts is involved) spaces for the type and the serial numbers of the unit, conditions of approval and identifying numbers of the dust collector parts." 30 C.F.R. § 33.11(a)

A state law, derived from a verdict in one or more of these cases, would conflict with federal law regarding the design of the dust collecting system and warnings because it would be impossible to comply with both and because state law stands as an obstacle to the accomplishment and execution of congressional objectives. *In re: West Virginia Asbestos Litigation*, 215 W. Va. 39, 592 S.E.2d 818 (2003); *Hartley Marine Corp. v. Mierke*, 196 W. Va. 669, 674, 474 S.E.2d 599, 604 (1996) *cert. denied sub. nom. Hartley Marine Corp v. Paige*, 519 U.S. 1108, 117 S.Ct. 942, 136 L.Ed.2d 832 (1997); *Northwest Cent. Pipeline Corp. v. Kansas Corp. Comm'n*, 489 U.S. 493, 509, 109 S.Ct. 1262, 1273 103 L.Ed. 509 (1989).

Appendix B

West Virginia Code § 58-5-2 provides,

> Any question of law, including, but not limited to, questions arising upon the sufficiency of a summons or return of service, upon a challenge of the sufficiency of a pleading or the venue of the circuit court, upon the sufficiency of a motion for summary judgment where such motion is denied, or a motion for judgment on the pleadings, upon the jurisdiction of the circuit court of a person or subject matter, or upon failure to join an indispensable party, may, in the discretion of the circuit court in which it arises, be certified by it to the supreme court of appeals for its decision, and further proceedings in the case stayed until such question shall have been decided and the decision thereof certified back. The procedure for processing questions certified pursuant to this section shall be governed by rules of appellate procedure promulgated by the supreme court of appeals.

The Court finds that the issues presented by the defendant, J.H. Fletcher & Co. are such that the Court finds it appropriate to seek the guidance of the West Virginia Supreme Court of Appeals. Accordingly, the Court **CERTIFIES** the following questions of law to the West Virginia Supreme Court of Appeals, together with proposed answers:

1. Whether a determination of liability predicated on a roof bolter dust collection system design that has not been heretofore deemed permissible by MSHA/Secretary of

Labor or which has not been heretofore otherwise approved by MSHA/Secretary of Labor is subject to preemption by virtue of the conflict between such a judicial determination and 30 U.S.C.A. § 844 and/or the occupation of the field of roof bolter dust collection system design by Federal regulatory authorities.

ANSWER: YES.

2. Whether a determination of liability predicated on a failure to warn relating to a roof bolter's dust collection system via a warning not specifically prescribed by MSHA/Secretary of Labor is subject to preemption by virtue of the conflict between such a judicial determination and 30 U.S.C.A. § 811 and/or occupation of the field of roof bolter dust collection system and dust control warnings by Federal regulatory authorities.

ANSWER: YES.

Appendix B

Order

WHEREFORE, the Court **ORDERS** that the above questions of law are **CERTIFIED** to the West Virginia Supreme Court of Appeals. The defendant, J.H. Fletcher & Co. is **DIRECTED** to prepare the appropriate and necessary petition, pursuant to Rule 13 of the West Virginia Rules of Appellate Procedure.

The clerk is **DIRECTED** to send teste copies of this order to all parties of record. **ENTERED**, this the 17th day of June 2005.

s/ Michael Thornsbury
The Honorable Michael Thornsbury
Chief Judge, 30th Judicial Circuit